

SOUTH AFRICA / JUDGMENT

S v R.M and Another (SS48/2022) [2024] ZAGPJHC 1011 (1 October 2024)

[2024] ZAGPJHC 1011

COURT

South Gauteng High Court, Johannesburg

BEFORE

Britz

CASE / FILE NUMBER

SS48/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: SS48/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

01/10/2024

In

the matter between: THE
STATE
and
M[...],
S[...] R[...]
ACCUSED
1
R[...],
J[...]
ACCUSED
2

JUDGMENT

BRITZ, AJ

- [1] The two accused in this matter are S[...] R[...] M[...] and J[...] R[...], both females and by now in their early 30s. They are charged with three counts:
1. Murder, read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 and further read with the provisions of sections 92(2), 256 and 258 of the Criminal Procedure Act 51 of 1977.
 2. Robbery, read with section 51(2) of the Criminal Law Amendment Act 105 of 1977 and further read with the provisions of section 92(2), 256 and 258 of the Criminal Procedure Act 51 of 1977.
 3. Attempted theft.
- [2] In count 1 it is alleged that on or about 13 April 2019 and at or near 1 Mount Fletcher Street, Via Pasitano Complex, Unit 50, Sandton, in the district of Johannesburg North, the accused unlawfully and intentionally killed Kyle Cowley.
- [3] In count 2 it is alleged that on and about the date and the place mentioned in count 1, the accused unlawfully and intentionally assaulted and killed Kyle Cowley and did then and with force take property from him to wit a cellphone and house keys the properties in his lawful possession (sic).
- [4] In count 3 it is alleged that on or about the date and place mentioned in count 1, the accused intentionally and unlawfully attempted to steal money from Capitec bank account of Kyle Cowley and or Capitec Bank.
- [5] It is further alleged that the accused premeditated or planned to kill the deceased and that at all relevant times during the commission of the offences the accused acted in the furtherance of a common purpose.

- [6] Throughout the trial the State was represented by Adv Moseki from the Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg. Accused 1 was represented by Adv Shongwe on judicare from Legal Aid South Africa. Accused 2 was represented by Ms Britz (unrelated to the Court), an admitted attorney with right of appearance in the High Court and in the employ of Legal Aid South Africa. All 3 legal representatives are thanked for their time and effort dedicated to this trial seeing that it was a trial that could not be finalised in the term it started and therefore had to be rolled from recess to recess, depending on availability of all role players.
- [7] After the minimum sentences referred to in counts 1 and 2 of the indictment and the applicable competent verdicts were explained to the accused they each plead not guilty to all 3 counts and both of them elected to remain silent and not give any plea explanation.
- [8] Both accused, however, made formal admissions in terms of section 220 of the CPA. These admissions, contained in a document, were read into the record by counsel for the State, admitted by each of the accused where after the document was, by consent, submitted into evidence and marked exhibit A.
- [9] In the formal admissions the accused admitted that the deceased was the person referred to in the indictment; that he died of strangulation; that the body of the deceased sustained no further injuries until a post-mortem was conducted on it by Dr Jessica Hill on 15 April 2019, who recorded her findings in exhibit B; the correctness of the facts and findings as recorded in exhibit B. They further admitted that W/O Smith from Sandton LCRC of the SAPS took photographs of the crime scene on 14 April 2019 as compiled in exhibit C, as well as the correctness of the scene and observations made by W/O Smith as per the photographs in exhibit C. The accused admitted that it is their faces that appear in video footage and photo albums and that fingerprints found at the crime scene belonged to them.
- [10] During the cause of the trial the accused made further admissions in terms of section 220 of the CPA. I deem it prudent to summarise those admissions at this point in the judgment for the sake of continuity. In a document, submitted by consent as exhibit E, the accused admitted that W/O Mbodi who is attached to the Scientific Analysis Section of the FSL as a Forensic Analyst compiled a photo album from exhibits he received from Administration of the FSL as per exhibit F. In a further document, submitted as evidence by consent, marked exhibit K, the accused admitted that one Gavin Craig Benecke downloaded video footage depicting scenes from 13 April 2019 outside Billy the Bum onto a USB memory stick which he handed to Sgt Tshisani; one Daniel Rudolf Hyster downloaded scenes from 13 April 2019 at Cambridge Shopping Centre onto a USB memory stick which he handed to Sgt Tshisani; one Charles Arthur Druckenbacher downloaded scenes from unit 50 Via Pasitano, Fletcher Street, Paulshof onto a

USB memory stick which he handed to Sgt Tshisani. Sgt Tshisani kept all these USBs under lock and key and handed it all to the

investigating officer, Sgt Mojapelo, on 17 February 2021 in the same untampered and unaltered condition he received it in. Sgt Mojapelo handed the USBs, contained in a forensic evidence bag, in at the FSL, where, on 23 February 2021, W/O Mbodi broke the seal of the bag, took out the USBs and compiled the still photographs contained in exhibit F. The accused also admitted the correctness of exhibit F.

- [11] I now turn to the evidence tendered in this case. The first witness to be call by the State was Mokwena Mojapelo. He testified that he was a Warrant Officer in the SAPS and the investigating officer of this case. He became the investigating officer in December 2020 while working on a similar case. As a result of the similarities this case docket was transferred to him from Sandton SAPS where it was first opened.
- [12] W/O Majapelo arrested both accused. Accused1's arrest came about after her fingerprints were lifted from a container in the flat of the deceased. The docket further contained video footage which Mojapelo send to the FSL and from which still photographs were printed (exhibit F) in which two women could be seen in the company of the deceased and later on leaving the complex where the deceased was found murdered. Using this evidence, he searched for accused 1 until he found and arrested her in Skierlik in the Winterveld area of Pretoria. Accused 1 disclosed the identity of accused 2 to Mojepelo and a couple of days after her arrest took him to an address in Block LKK Soshanguwe where accused 2 was found and arrested.
- [13] Upon her arrest Mojapelo explained accused 1's constitutional rights to her and detained her. Accused 1 indicated to Mojapelo that she wished to make a statement explaining how her fingerprints came to be in the deceased's flat. Mojapelo arranged for a female police officer to conduct a physical examination of accused 1 and also for her to be taken to a local hospital to be examined before she could make any statement. He further arranged for a neutral, senior officer, Col Nama (later promoted to Brigadier), to come and take accused 1's statement.
- [14] Upon accused 2's arrest Mojapelo had arrangements made for her warning statement to be taken down by a neutral, senior officer, Lt Col Makhubela.
- [15] W/O Majapelo testified that accused 2 is only linked to this case because she was mentioned by accused 1 in her warning statement to Col Nama and because she can be seen on video footage taken at Billy the Bum, the residence of the deceased and an ATM at Cambridge Mall. On some of the photographs from the deceased's residence she can be seen holding a remote control with keys which he assumed were the keys of the deceased's flat and a bank card, which he also assumed was that of the deceased. On the video footage from Cambridge Mall accused 2 can be seen attempting to withdraw money. From photographs taken by the police photographer inside the flat of the deceased Mojapelo noticed three ATM slips showing that at the time accused 2 was at the ATM there were attempts to withdraw money, but it was unsuccessful as the wrong PIN was used.

- [16] W/O Mojapelo testified that he never visited the scene of the murder because he only became involved in the case when it was transferred from Sandton long after the incident. From what he could establish through his investigations, the only item missing from the deceased's flat, other than the keys, was his cell phone. The cell phone was never traced or recovered.
- [17] In cross examination by counsel for accused 1 W/O Mojapelo testified that he received the docket in December 2020 when he was a Sergeant at Provincial Organized Crime Unit at Johannesburg. He had 15 years of service in the SAPS by then of which 10 years was as a detective.
- [18] He confirmed that he arrested accused 1 on 14 January 2021 and that he arrested accused 2 on 16 January 2021, after accused 1 pointed her out. He testified that on arresting accused 1 he explained her constitutional rights to her and recited the rights he so explained. When questioned about the right not to incriminate herself, he testified that he explained that to her when she indicated to him she wanted to make a statement. W/O Mojapelo identified a statement from the docket which he made regarding the arrest of accused
1. When confronted with the allegation that he did not explain the right against self-incrimination, he disputed the allegation and referred to a paragraph in the statement which stated that he explained the accused's constitutional rights to her and detained her free from any injuries.
- [19] It was put to W/O Mojapelo that accused 1 has a scar on her back close to her waist which she sustained as a result of what happened in the deceased's flat. Mojapelo answered that he had no knowledge of what happened or of the scar, as he did not physically examine accused 1, but left that to a female officer and later on a doctor at the hospital who compiled a J88 which was filed in the docket.
- [20] W/O Mojapelo was referred to still photographs in exhibit F. He identified the 2 accused, the deceased and various locations depicted in the exhibit. He conceded that there was no video to show what occurred in the flat of the deceased and also no video showing accused 1 at the ATM in Cambridge Mall or in possession of a cell phone that could have belonged to the deceased.
- [21] Accused 1's version of what happened was put to W/O Mojapelo at length. Mojapelo replied that he could not comment on the version as he did not know what happened. He did however testify that he would find it surprising if the 2 accused were not working together or if one of them did not know what the other was doing.
- [22] After being cross examined by counsel for accused 1, counsel for accused 2 also cross-examined W/O Mojapelo. She referred him to the scene photos contained in exhibit C. W/O Mojapelo confirmed that from the sketch plan contained in the exhibit the flat only had one entrance/exit door which was located in the kitchen area. He identified the main bedroom and confirmed that it was the only room in which a used condom was found. It was also the

only room that was in disarray. Except for the used condom, there were also 3 ATM slips laying in the room.

- [23] W/O Mojapelo's attention was drawn to exhibit F. Based on the date and time stamps contained in this exhibit he testified that the accused and deceased arrived at the latter's residence at 05h09 on 13 April 2019. When they alighted from the Uber accused 1 and the deceased were on the same side of the vehicle and accused 2 on the other side. Later that same morning accused 2 could be seen leaving the complex with a remote and keys in her possession. Before leaving she could be seen going to the guard house and speaking to a guard. The time stamp on these pictures place it around the same time accused 2 went to Cambridge. This was the only time accused 2 could be seen in possession of a remote and keys. The exhibit shows both accused leaving the complex for the final time at 09h20 that morning, which is a short time after accused 2 returned from Cambridge Mall.
- [24] W/O Mojapelo confirmed that there is a difference between a warning statement and a confession as well as the procedure to be followed for the taking of each. The procedure for the taking of a confession is more stringent than that of a warning statement. He confirmed that there were only warning statements taken from both accused. He further confirmed that this was done before their first appearance in court and that it was done by neutral and senior officers at his instance. He explained that he requested senior officers to take the statements as he anticipated it to turn into confessions, rather than run of the mill warning statements. He denied the allegation put to him that he did not explain accused 2's constitutional rights to her at all or in full. He conceded that after their first appearance in court neither of the accused wanted to say anything more than what they have already said.
- [25] Counsel for accused 2 put her client's version to W/O Mojapelo. For the most part, W/O Mojapelo testified that he could not comment on the version as he did not know what happened. He confirmed that when he took over the docket he only had the finger prints of accused 1 and the video footage to aid in his investigation. The docket did not contain any statements from neighbours of the deceased as to a commotion they heard the night before his body was discovered, or of an unknown female laying outside on a patch of grass. He confirmed that as far as he knew there was no garden where the deceased stayed and that the only greenery was at the entrance to the complex, close to the guard house. He also confirmed that there was no evidence in the docket about accused 2's fingerprints being found in the deceased's flat.
- [26] In re-examination W/O Mojapelo explained that he identified accused 2 from a scar or mark on her one cheek that one could see on the video footage that was in the docket. He explained how he explained both accused's constitutional rights to them. The procedure that he follows is to recite the rights from memory during arrest and then to hand an accused a written copy of these rights once they were at a police station. He identified a document shown to him by counsel as the document he read and handed to accused 2 regarding her constitutional rights. The document was handed in as exhibit H.

- [27] This concluded the testimony of this witness. The next witness to be called was Mxolisi Edwin Nama.
- [28] Nama testified that he was a Brigadier in the SAPS, with 28 years of service. He was based at the Serious and Violent Crimes Unit at the Provincial Head Office in Gauteng. At some date he could no longer remember due to the passage of time he received a request to go to a police station to take the statement of an accused. By then he was leading a team investigating a syndicate from Pretoria. Members of the syndicate were identified as woman who would go to clubs, lure men to them, spike the men's drinks and then robbed them.
- [29] Brigadier Nama obliged the request, went to the police station and took a statement from accused 1. Before taking down the statement he adhered to the constitutional requirements and prescripts. These included the following: informing the accused of the charge against her; conversing with her in a language she understood; informing her of her constitutional rights including the right to remain silent and not to give any statement, incriminating or not; the consequences of giving a statement and the right to legal representation.
- [30] Brigadier Nama identified a document shown to him as the statement he took from accused 1. The statement was handed in as exhibit J. Brigadier Nama testified that he went through the statement with the accused paragraph for paragraph. He wrote down what she said to him. After completing the statement, he read it back to the accused and both he and she signed the statement. Brigadier Nama read the contents of the statement into the record.
- [31] In cross examination by counsel for accused 1, Brig. Nama testified that at the time he took the statement he held the rank of Colonel. The nature of the statement he took was that of a warning statement. He did not make use of an interpreter when he took down the statement as he and the accused were both Setswana speaking. They spoke in Setswana to each other and he wrote in English. He took the statement down piece-meal as it was given to him by the accused. After taking down the statement he read it to her and she signed to certify the correctness thereof.
- [32] Brigadier Nama denied that he failed to read the statement back to the accused and that he did not write down everything she told him word for word. He denied that he told her with regards to some aspects she could explain that in court. He testified that the statement she gave him was so long that it did not fit the pro forma and that he had to use extra loose pages. He testified that with this in mind there was no reason for him not to write down everything the accused told him and to tell her she could explain certain aspects in court. He testified that if there were portions of her version given in court which did not appear in the statement it was because she never disclosed those portions to him. He drove far to take her statement and would not have wasted his time

by not taking down everything she told him. He left it for the court to decide whether she implicated herself in her statement, but expressed the view that the statement was exculpatory.

- [33] In cross examination by counsel for accused 2, Brig. Nama testified that the pro forma warning statement is designed in such a way that by looking at it, the reader would be able to see what options were selected, by whom the statement was read back afterwards and the date and place where the statement was taken.
- [34] This concluded the testimony of this witness. Hereafter a trial-within-a-trial followed pertaining to the admissibility of accused 2's statement. The statement was eventually ruled to be inadmissible. After this the State closed its case.
- [35] Both accused elected to testify.
- [36] Accused 1 testified that she is a single parent of 3 children. During April 2019 she and the children stayed in Skierlik in the Winterveld area of Pretoria. She was unemployed and had a hard time providing for her family. A man by the name Umpilo knew the ins and outs of her struggles. Umpilo was the father of accused 2's child. Accused 2 was a sex worker and Umpilo promised to introduce accused 1 and 2 to each other so they could work together.
- [37] On 13 April 2019 the two accused met for the first time after accused 2 phoned accused 1 and arranged a meeting at a BP garage in Pretoria. Accused 2 explained the 'tricks of the trade' to accused 1 and the two of them set off to a nightclub in Fourways in a car driven by one Bra Cry. On their arrival at the club they discovered that it was already past 23h00 and the club was closing. Bra Cry then drove them to a club named Billy the Bum at the instance of accused 2. He left them there and drove off.
- [38] At Billy the Bum the two accused entered, bought liquor and sat at a table enjoying themselves. When the club closed in the wee hours of the following morning they went outside with the rest of the patrons who were still there. Whilst outside it happened that they, and especially accused 1, caught the interest of the deceased. He gestured for her to come to him and she obliged. The

two of them struck up a conversation in which they exchanged names and other personal details. They came to an arrangement that accused 1 would have sex with the deceased in return for R1 500 per round. The deceased did not mind that accused 2 had to tail along and the three of them drove off in an Uber hailed by the deceased.

- [39] En route to his residence, the deceased requested the Uber to stop at a filling station. Both accused and the deceased got out and went inside the shop. There the deceased bought pies and a packet of condoms. They then drove to the deceased's residence which was a flat in a complex. They arrived there just after 5h10 and entered with the deceased. The deceased got out a bottle of whisky and they all started drinking and eating the pies. Accused 1 also helped herself to biscuits which was in a tin on the

kitchen counter as well as ice cream. They all made pleasantries during which the deceased showed them his accolades from school and the lay-out of the flat.

- [40] The flat consisted of two levels. The ground level consisted of a kitchen, lounge, two bedrooms and a bathroom. From there stair led to the upper floor which was one large room used by the deceased as his work space. It also contained a couch and gym equipment.
- [41] After the pleasantries were observed the deceased showed accused 2 to the bedroom she would be using for the night. He then showed accused 1 to the master bedroom in which he and she would spend the night. The two bedrooms were approximately 7m apart from each other, separated by a bathroom.
- [42] Accused 2 went into the bedroom shown to her and accused 1 and the deceased retired to the main bedroom. There, accused 1 stepped out on the balcony and lit a cigarette. The deceased followed her and started kissing her all over her body. This eventually led to them having sexual intercourse, per vagina, on the bed using a condom from the packet the deceased bought earlier on at the garage. They both fell asleep hereafter.
- [43] At some point in time accused 1 woke up and discovered that the deceased was no longer laying in bed beside her. She went to the toilet and heard pleasurable sounds coming from the 2nd bedroom. She slightly opened the door and saw accused 2 standing there wrapped in a towel and the deceased wearing only his trousers.

She closed the door and went back to the main bedroom, where, still feeling the effects of the alcohol, she laid on the bed facing down.

- [44] After a while accused 1 felt something at he back. She opened her eyes and discovered it was the deceased who was trying to have anal sex with her. She informed him that she had never done it before. The deceased insisted she should try it with him. She turned around on the bed and told him she did not want to do it. The deceased insisted until they became aggressive, pushing each other away. When the deceased pushed her accused 1 landed with her back against a sharp edge of the bedside table which scratched her

open on her back at the waist and caused her to bleed. She testified that she did not want to have anal sex with the deceased as she had never done it before and he had also not yet paid her for the first round of sex they had.

- [45] Accused 2 came inside the main bedroom and enquired about what was happening. Accused 1 put on her clothes and told accused 2 about the argument regarding anal sex. Accused 1 left the bedroom and went to the kitchen where she drank water from the fridge. During this she heard accused 2 talking to the deceased about payment of money. She felt dizzy and went upstairs where she sat on the couch. She started to feel sick and in need of fresh air. She went downstairs and out of the flat to a patch of grass where she

vomited and then fell asleep. She never went back into the flat again and could therefore not account for what happened inside the flat. All she knew was that the last time she was in the flat accused 2 was trying to solve the problem regarding anal sex with the deceased.

[46] Accused 1 testified that later that morning she was awoken by accused 2 who said they should leave. Accused 1 walked to the gate which opened without her knowing how, while accused 2 walked to the guardhouse where she gave the guards snacks and juice which came from the deceased's flat. The two accused kept on walking until they came to a place where they hailed a taxi to Pretoria. Accused 2 paid the fare as accused 1 did not have money. They did not talk about what happened inside the deceased's flat. Whilst inside the taxi accused 1 saw a touch screen cellphone in possession of accused 2. She did not know whose phone it was or

where accused 2 got it from. When they arrived in Pretoria Central accused 2 sold the phone and gave accused 1 R500 from the proceeds.

They boarded another taxi which dropped accused 2 at Block LKK Soshanguwe, near the mall. Accused 1 continued homewards.

[47] The two accused had no contact with each other for months after this. Accused 1 got a fright from the dangers of sex work and no longer wanted to engage in it. However, one day she happened to come across accused 2 by chance. She told accused 2 that she was concerned about what happened with them in Sandton in April 2019 because she heard rumours from people at the salon that a white man from Sandton was killed and that the police was looking for two women who were suspected of the murder. Accused 2 became angry

and said it had nothing to do with them and that the white man was not even from South Africa. Despite this the rumours did not sit well with accused 1. She kept on having nightmares of the deceased trying to have anal sex with her to such an extent that she went to church to ask for prayers to help her.

[48] Accused 1 was referred to exhibits C and F. She identified exhibit C as showing the inside of the deceased's flat and various items in it such as the juice he bought at the garage and the box from which he got the condom he used when they had sexual intercourse. She identified accused 2 at the ATM and also in possession of the remote and key of the deceased's flat. She further identified the body of the deceased as it was photographed with two electric cords around the neck. She denied that she was at all complicit in the killing of the deceased, robbery of any of his possessions or any attempt to steal money from his bank account. She testified that the last time she saw the deceased he was in a good state just as he was when they met.

- [49] When asked about her arrest, accused 1 confirmed the essence of W/O Mojapelo's version. She confirmed that her constitutional rights were explained to her in full and that she freely and voluntarily decided to make a statement to the police about what she knew of the incident. She confirmed that she was taken to a doctor before giving her statement, that she was examined by the doctor, asked about the scar on her back and that she told the doctor that she sustained it when the deceased pushed her and she fell against the bedside table.
- [50] Accused 1 confirmed that her statement was taken down by Brig. Nama. She, however, testified that Nama was Xhosa speaking and she was Setswana speaking. As a result of this there was another police officer in the room where Nama took the statement to act as interpreter, should it become necessary. She testified that she told her version to Nama and that he wrote it down in English. Afterwards the statement was not read back to her, but she signed it as requested. She testified that she heard the statement Brig. Nama read out in court and that she agreed in essence with it. There were, however, certain things in the statement she did not fully agree with and other things Nama omitted from the statement.
- [51] After accused 1's evidence in chief, counsel for accused 2 cross examined her at length over days. During this cross examination accused 1 confirmed how she met accused 2 and that she decided to do sex work with accused 2 as a means to get money to take care of her family. She confirmed that the night she went with accused 2 to Billy the Bum was the first time she engaged in sex work. She further confirmed that she was there to work and not to get emotionally involved with any client as that could have compromised her future in the industry.
- [52] Accused 1 confirmed her version as testified in chief. She added that she never got paid for the sex she had with the deceased and that the units in the complex where the deceased stayed had gardens with grass and flowers next to the stairs. She confirmed the selling of the cellphone in Pretoria; that she knew the general area in which the taxi dropped accused 2 off, but not accused 2's specific address; that accused 2 contacted her two days after the incident and that she then declined to go with accused 2 as she could not risk the dangers involved in sex work. After that her phone got lost and she lost contact with accused 2 until they had a chance meeting months after the incident. She told accused 2 what she heard about a murder in Sandton and that she was concerned about it. She confirmed that accused 2 became angry and that their paths then split until they were arrested. She also confirmed that the incident with the deceased gave her nightmares to such an extent that she went to church for prayers.
- [53] Accused 1 repeated her evidence that she did not point out accused 2's address to W/O Mojapelo. When asked how it was possible for Mojapelo to find accused 2 in a place as big as Soshanguwe Block LKK, she could not give an explanation, adding that she was not present during accused 2's arrest.

- [54] When questioned about payment for the sex she had with the deceased, accused 1 reiterated that she did not receive any payment. She explained that after having sex she and the deceased went to sleep. She did not demand payment as she was previously instructed by accused 2 to do, as she did not know whether there would be further sex between her and the deceased and she trusted him because of his demeanour, the things he bought for them at the garage and the fact that he was a white man and as a result thereof less inclined to be a scammer. She added that if they had sex three times that day she would have shown him mercy and only charged him for two times. However, even after things turned sour between her and the deceased she did not demand her money from him, but left it to accused 2 to sort out the problem. Later when she and accused 2 left the complex she never asked accused 2 about the money that was owed to her. She testified that she had no idea why accused 2 gave her R500 in Pretoria
- [55] Counsel for accused 2 took accused 1 through her statement given to Brig. Nama line for line, page for page to determine what the accused agreed with, what not and what was omitted by Nama. Accused 1 agreed with the majority of the contents of the statement. In some instances, it was pointed out to her that her evidence in court was at odds with what was contained in the statement. On these occasions accused 1 requested that her evidence in court should be preferred over the contents of the statement, despite her earlier confirming the correctness of the statement to her own counsel in chief.
- [56] Accused 1 denied that she was the only one who could have killed the deceased as she was the only one with a motive to do it. She testified that she did not have the strength to overpower the deceased and kill him. She denied that her evidence with regards to the cellphone she saw in possession of accused 2 was a fabrication. She testified that she and accused 2 were only telling the court what they each observed and that for that reason both their versions should be accepted.
- [57] After being cross examined by counsel for accused 2, counsel for the State also cross-examined accused 1. During this cross examination accused 1 testified that the deceased was masculine and that it would have been impossible for her alone to injure him. She testified that it did not sit well with her that the deceased did not pay her for her services. She did however not mention to accused 2 that she was not paid. Accused 2 only intervened because of the issue of anal sex. She and accused 2 had a friendly relationship with each other and trusted each other. It was for this reason that accused 2 intervened when things between accused 1 and the deceased turned sour.
- [58] When asked about her knowledge of sex work, accused 1 testified that she picked some of it up watching sex workers on the street and some from accused 2. Despite the fact that she and accused 2 were together at the deceased's flat she never disclosed to accused 2 that she did not get paid.

- [59] Accused 1 testified that when she heard about the murder in Sandton she did not think much of it as it was just news for a day. She did not go to the police to tell them what she knew because doing sex work was a crime and she was scared of getting into trouble for having engaged in it.
- [60] When questioned about the nightmares she testified about earlier, accused 1 testified that it was not nightmares, but only a single dream she had once about the deceased trying to have anal sex with her. She could not explain why she used the plural in the past and never corrected it.
- [61] Accused 1 testified that she knew nothing about the version put to W/O Mojapelo that accused 2 pleaded with the deceased for transport money after the fall-out between him and accused 1, despite the fact that her counsel, on several occasions during Mojapelo's testimony, took instructions from her and put it to Mojapelo that accused 2 pleaded desperately for transport money as they were stranded at a strange place. She added that the deceased gave accused 2 transport money even before they went to their separate bedrooms. She further denied that the deceased bought J&B whiskey at a garage despite this being the version put to Mojapelo by her counsel. She was unable to say why she never corrected her counsel when these mistakes were made.
- [62] Accused 1 was cross examined about the cellphone she said accused 2 sold in Pretoria. She testified this was a different phone from the one accused 2 used earlier. When accused 2 first phoned Bra Cry she used a Nokia. The phone that she sold was an Android touch screen phone. Accused 1 did not know whose phone this was or where, when and how accused 2 came to be in possession of it. The first time she saw this phone was when accused 2 took it out in Pretoria to sell it.
- [63] Accused 1 denied that she and accused 2 were friends and that they worked together to kill, rob the deceased and attempted to steal money from his bank account.
- [64] In re-examination accused 1 testified that she never told anybody that the deceased bought liquor at the garage. She did not know where her counsel got that version from. She also did not testify that accused 2 pleaded with the deceased for transport money, but she did mention it to her counsel in consultation. She testified that she saw accused 2 with R200 and that accused 2 told her it was transport money she was given by the deceased.
- [65] Accused 1 testified that she was surprised when she heard the rumours about the white man murdered in Sandton. When asked why this rumour surprised her she testified that it surprised her because it was said that the white man was with two girls from Pretoria depicted in video footage.
- [66] Accused 1 further testified that she never gave accused 2 the deceased's bank card, PIN or remote and key. She had no idea how any of that came to be in the possession of accused 2.

- [67] In questions in clarification by the Court, accused 1 testified that she had never seen the deceased's cellphone and that she could not remember whether she saw the remote and key before seeing them in possession of accused 2.
- [68] When asked about the rumour she heard, accused 1 testified that she heard the rumour from Thembi at the salon in 2019 who in turn heard it from two men who did gardening jobs in Sandton. It was rumoured that a white man was murdered in Sandton and that he was last seen with two girls from Pretoria. The rumour did not contain any information about when the man was killed, where he was killed, how he was killed nor did it contain a description of the murdered man, except that he was white. She testified that the rumour made her think of the man she and accused 2 were with because he was still alive when she left him, but she did not see him when she and accused 2 finally left the complex. She confirmed that it was admitted by the defence that the deceased was murdered on 13 April 2019 and that the video footage album was only compiled on 8 August 2021. She was unable to explain how, in this scenario, the people at the salon could have known about the video footage in 2019.
- [69] This concluded the testimony of accused 1 and her case was closed.
- [70] Accused 2 testified in her defence. Her testimony was briefly the following: In April 2019 she was residing in Block LKK Soshanguwe. This is also the place where she was arrested on 16 January 2021. She and accused 1 were friends and working together as sex workers for approximately 2 years in April 2019.
- [71] On the evening of 12 April 2019, she and accused 1 met each other at around 21h00 as arranged at Ipithombi to go and entertain themselves. They hailed an Uber which took them to a club in Fourways. On their arrival there they decided to rather go to Billy the Bum. The Uber took them there. The Uber driver gave accused 2 his cellphone number and told her to call him when they were ready to leave as he worked in the vicinity. Both accused went into Billy the Bum, sat at a table, counted the money they had for drinks and consumed Heinekens which they bought.
- [72] When the club closed, they went outside with the rest of the patrons that were still there. Accused 2 tried to phone the Uber driver, but he did not pick up his phone. The deceased was amongst the patrons standing outside and gestured for accused 1 to come to him, which she did. Accused 1 went back to accused 2 and told her the deceased wanted accused 1 to go home with him. She had told the deceased that she was with accused 2 and he had no problem for accused 2 to accompany them as he had two bedrooms. Since the Uber driver did not answer his phone accused 2 agreed to go with accused 1 and the deceased, but reminded accused 1 that she (accused 2) had an appointment later that day.

- [73] The deceased called an Uber and the three of them set off to the deceased's place of residence. On the way there, the deceased requested the Uber driver to stop at a garage. There the two accused and deceased picked what they wanted and the deceased paid for it all using his bank card. They bought condoms, cigarettes, cranberry juice, pies and biltong. From there they drove to the deceased's place of residence which was in an access-controlled complex depicted in exhibit F.
- [74] Inside the deceased's flat they all sat at a table and chairs. Accused 2 ate a pie. The deceased offered them whiskey which accused 2 declined, indicating that she wanted to go sleep. The deceased and accused 1 consumed liquor while eating. After eating his pie, the deceased stood up and went to prepare the room accused 2 would occupy. On his return he showed her the room. She said her good-nights, went to the bathroom to use snuff and thereafter went to the bedroom prepared for her, where she closed the door and went to sleep. She had a restful sleep without any disturbance.
- [75] At some point when it was already light outside she was awoken by accused 1 who gave her the same bank card the deceased used earlier at the garage and PIN, with instructions to go draw money and buy food as there was nothing in the flat to have for breakfast. Accused 1 also instructed her to lock the door and take the key so she and the deceased would not be disturbed. She obliged, hence the video footage in exhibit F, showing her in possession of the deceased's remote and key.
- [76] Since the place was unfamiliar to accused 2, she went to the guard house and enquired about the nearest shopping mall. The guard asked where she was visiting and she told him she was visiting at the white man. The guard told her where to go and requested her to bring him something back from the mall.
- [77] Accused 2 went to the mall, found an ATM and attempted to draw money using the card and PIN she got from accused 1. After several attempts she was unsuccessful and left empty handed. Back at the deceased's complex she explained to the guard that she was unable to draw money and promised to bring him something from the house where she was visiting. She went back to the deceased's flat, entered and called for accused 1 from the kitchen. Accused 1 came from the bedroom she and the deceased occupied. Accused 2 explained to her what happened at the ATM. She further informed accused 1 that she was leaving as she had another appointment. Accused 1 went back into the bedroom and accused 2 took the juice and biltong that were bought at the garage and left the flat, leaving the key behind.
- [78] Having walked for approximately 10 meters accused 2 became aware of accused 1 following her. She slowed her pace to allow for accused 1 to catch up to her. At the gate accused 1 exited and waited on the pavement, while accused 2 went to the guard house to give the guard the juice and biltong. Thereafter both accused walked until they got a taxi to take them to Pretoria. Each of them paid for her own fare. On their arrival in Pretoria their ways split. However, they remained friends and continued to work together until the time of their arrest. At all relevant times accused 1 knew exactly where accused 2 stayed.

- [79] Accused 2 disputed accused 1's version of events where it differed from her own. She further denied any knowledge of and involvement in the charges preferred against her.
- [80] This concluded accused 2's evidence in chief. Hereafter she was cross examined by counsel for accused 1 and the State.
- [81] In cross examination by counsel for accused 1, accused 2 was referred to various contradictions between her version and that of accused 1. She was asked to explain why these contradictions were not disputed during the cross examination of accused 1. She explained this with a variety of answers ranging from she did not know she could/should dispute it; she did not want to act out of place and be disrespectful to the Court; she did not tell her counsel; she told her counsel, but her counsel never took it up with accused 1 and she knew she would get an opportunity to place her version before the Court.
- [82] For the rest of her cross examination by counsel for accused 1, accused 2 stuck to her version, disputed the version of accused 2 where it differed from her own version and denied that she was guilty of any of the offences charged with.
- [83] In cross examination by counsel for the State, accused 2 confirmed that she and accused 1 were good, reliable friends to each other. She confirmed that on leaving Billy the Bum she was under the influence of liquor, but not to such an extent that it affected her senses. She testified that the only reason she went to the deceased's flat was because she was invited and the Uber driver she called did not answer his phone.
- [84] Accused 2 maintained her version that she did not hear any commotion from the room occupied by the deceased and accused 1 as she was sleeping. She testified that accused 1 never informed her of any altercation between accused 1 and the deceased or that either one of them sustained any injuries. She also did not notice any injuries to accused 1 and there was no indication in accused 1's demeanour to indicate that she was injured. She disputed the version that accused 1 was injured in the deceased's flat. She confirmed that the deceased was taller than accused 1 and well built, but was at pains to concede to the proposition of counsel for the State that it would have been impossible for someone like accused 1 to overpower and kill the deceased on her own.
- [85] Accused 2 confirmed her earlier version that at all relevant times she and accused 1 each paid their own travel fares. She added that for the trip from Pretoria to Billy the Bum they each paid R250.
- [86] When questioned about her trip to the ATM, accused 2 testified that she was given the deceased's bank card and PIN by accused 1 to draw money for food and for accused 1 to have money. The money was not meant for services rendered and she saw nothing untoward in the entire scenario. She denied that her going to the ATM was an attempt to steal money from the deceased's bank account.

- [87] Accused 2, once again, denied that she was guilty of any offence charged with.
- [88] After a brief re-examination which yielded nothing further, accused 2's case was closed.
- [89] All three counsel addressed the Court on the merits of the case. Counsel for the State conceded bearing the onus to prove the guilt of the accused. She also conceded that the entire case against both accused was based on circumstantial evidence alone. She referred to the relationship between the accused and the contradictions between them and argued that based on that the only inference to be drawn was that the accused worked together to murder and rob the deceased and attempted to steal money from his bank account. She therefore requested that the accused be convicted as charged.
- [90] When questioned about the correctness of the wording of count 2, counsel submitted that robbery with aggravating circumstances was not a substantive crime, but a variant of the crime of robbery.
- [91] Counsel for accused 1 also pointed out that the onus rested on the State to prove the guilt of the accused. She also submitted that the only evidence in the matter was circumstantial in nature.
- [92] She submitted that with regards to count 1 the State failed to prove the guilt of the accused. She further submitted that even if the deceased was killed as a result of sex work that went wrong, there was no evidence of any planning or premeditation. She submitted that the heart of the issue with regards to count 1 was the identity of the murderer. However, in the same breath, she submitted that it would not have been possible for a single person to have killed the deceased in the manner he was killed. Despite this she pointed out that accused 1 cooperated with the police since her arrest and that her version was the more probable one between her and accused 2. She argued that accused 2's version left much to be desired and was clearly nothing but a fabricated story to exonerate her of any wrong-doing. She further submitted that the Court should look at the versions of both accused and argued that if one was guilty the other should also be guilty.
- [93] With regards to counts 2 and 3, counsel for accused 1 submitted that there was no evidence linking accused 2 to those offences and that she should therefore be acquitted of those charges.
- [94] Counsel for accused 2 submitted that accused 2 should be acquitted of all the charges. She pointed out some contradictions in accused 1's testimony as well as inherent improbabilities in her version. She submitted that in comparison to accused 1, accused 2 was a good witness who did not contradict herself on any material aspects. She further argued that all the evidence tendered pointed to accused 1 as the perpetrator. Only accused 1's fingerprints were found at the crime scene and the ATM slips were found in the room occupied by accused 1 and the deceased.

- [95] Counsel for accused 2 further argued that the State failed to prove the existence of requirements in s 51(1) of the CLAA in that the State failed to prove that the murder was not committed by a single person acting alone. She submitted that in this regard the State was not asking the Court to draw an inference, but to speculate.
- [96] With regards to count 2, counsel argued that on the State's own version the items mentioned in the charge were taken after the death of the deceased. For that reason, the crime committed could not have been robbery, but at best that of theft.
- [97] This concluded the evidence and arguments in the case.
- [98] It is trite that in all criminal trials the onus rests on the State to prove the guilt of the accused beyond a reasonable doubt. There is no onus on an accused to prove her innocence. If the version of an accused is reasonably, possibly true the case must be adjudicated on that version and the accused must be acquitted if she cannot be convicted on that version, even if the Court does not believe every aspect of that version.[1]
- [99] The benchmark case for the correct approach when dealing with circumstantial evidence in our courts remains *R v Blom*[2] in which the following was stated:

‘In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.’

[100] In *S v Reddy*[3] the Appellate Division (as it then was) stated the following on the matter:

‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202 – 3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn’. The matter is well put in the remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508 -9:

‘To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.’

Best on Evidence puts the matter thus:

‘Not to speak of great numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone.’ ‘

[101] The following facts are common cause in this case:

- a. During April 2019 the two accused resided respectively in Skierlik and Soshanguwe, Pretoria.
- b. Past midnight on 13 April 2019 they were together at Billy the Bum in Sandton.
- c. They met the deceased, Kyle Cowley, there when the club closed early that morning and went with him to his flat at Unit 50 Via Pasitano, 1 Mount Fletcher Street, Sandton, where they arrive just past 05h00 in the morning via an Uber.
- d. All three of them entered the flat which had a lay-out as depicted in exhibit C.
- e. At round 08h40 that morning accused 2 left the complex in possession of the deceased’s remote control, house keys and bankcard and went to an ATM at Cambridge Mall where she attempted to withdraw money from the deceased’s bank account, without success.
- f. At around 09h00 she returned to the complex and re-entered it.
- g. At around 09h20 accused 1 and 2 left the complex.
- h. On 14 April 2019 the body of the deceased was found laying in the main bedroom of his flat with two electrical cords tied around his neck.
- i. The last time the deceased was seen alive, he was in the company of accused 1 and 2.
- j. Pictures of the flat were taken by the police after they were called to the scene and compiled in an album handed in as part of exhibit C.
- k. A post mortem examination was conducted on the body of the deceased and the cause of death was determined to be consistent with strangulation.
- l. During December 2020 the docket was transferred from Sandton SAPS to the Provincial Organized Crime Unit in Johannesburg where W/O Mojapelo became the investigating officer.
- m. Through his investigation he linked accused 1 to the crime scene with a fingerprint that was lifted from the kitchen of the deceased’s flat.
- n. W/O Mojapelo traced accused 1 to where she stayed in Skierlik and arrested and detained her.
- o. Two days after the arrest of accused 1, W/O Mojapelo arrested accused 2 at her place of residence in Soshanguwe based on information he received from accused 1.

- p. Accused 1, freely and voluntarily and fully appraised of her constitutional rights, gave a warning statement to Brig. Nama of what she knew of the deceased. The statement was handed in as exhibit J.
- [102] Both W/O Mojapelo and Brig. Nama made a favourable impression on me. They testified calmly, clearly and coherently. After careful scrutiny of their testimony I was unable to find any material contradictions in either one's testimony. Their testimony did not reveal any bias against any of the accused. Mojapelo merely followed up on leads in a docket he received long after the deceased was murdered. There was no indication or allegation during the trial that he did anything more than what was expected of a detective in the SAPS doing his duty.
- [103] Brig. Nama was a neutral, senior police officer who only became involved in the case after he acceded to a request to take down a warning statement from a suspect. No attempt was made during the course of the trial to even suggest that Nama's involvement was questionable or that he knew what accused 1 was going to say.
- [104] It was initially put in cross examination that both Mojapelo and Nama failed in their duty to appraise accused 1 of her constitutional rights. This version was, however, later on reneged by accused 1 in her own testimony.
- [105] In light of the above-mentioned analysis of the evidence of W/O Mojapelo and Brig. Nama I accept their testimony as credible and reliable.
- [106] Accused 1 and 2 were both most unimpressive witnesses. They contradicted each other on almost every material aspect. Peculiarly these contradictions were not confined to what happened at the deceased's flat, but included innocent aspects such as when, where and how they met each other; the nature of their relationship with each other as well as their contact with each other after 13 April 2019. Most remarkably, however, was how expertly they toed the line between distancing each from the other, without directly implicating each other of any wrong-doing, let alone the commission of any offence.
- [107] Accused 1 further contradicted the version she gave to Brig. Nama, the version her counsel put to W/O Mojapelo and Brig. Nama and her own testimony in court. It was put to Mojapelo that the deceased bought J&B whiskey at the garage when he also bought pies and condoms. Later accused 1 denied that the deceased bought whiskey at the garage. She could, however, not explain where her counsel got such a version from.
- [108] It was put to Mojapelo that after having sex with the deceased accused 1 fell asleep. She later woke up to go to the toilet and heard pleasurable sounds from the room accused 2 was in. She did, however, not see what was happening in the room. When testifying accused 1 contradicted this version by saying that she opened the door slightly and saw accused 2 wrapped in a towel and the deceased standing in the room, wearing only his pants.

[109] The version put to Mojapelo as to what happened when the deceased wanted to have anal sex with accused 1 also differed materially from what accused 1 eventually testified. It was put to Mojapelo that as soon as she realised the deceased tried to penetrate her she screamed and the deceased then covered her face with a pillow preventing her from screaming and breathing. She managed to push the deceased away and attempted to stand up. The deceased then pushed her forcefully against the bedside table where she got injured on her flank. She screamed and the deceased tried to force her back on the bed, calling her vulgar words. Accused 2 arrived on the scene and enquired what was happening. Accused 1 told her the deceased wanted anal sex which she refused and that he also did not pay her for the first round of sex. The deceased was then aggressive and threatened to assault both accused. Accused 2 pleaded

with the deceased to give them money for transport as they were in an unfamiliar place. Accused 1 went to the bathroom, urinated, got dressed and thought it would be safer outside the flat. She left and vomited on some grass outside where she fell asleep until accused 2 woke her up later that morning.

[110] In her own testimony accused 1 said nothing about screaming when she felt the deceased trying to penetrate her from behind. Instead she testified about having a conversation with the deceased about anal sex. Her version with regards to the pushing was that she and the deceased pushed each other and not that he intentionally pushed her against the bedside table. Nothing was said about the deceased trying to force her back on the bed or that he became aggressive and threatened to assault both accused. Furthermore, she testified that after she left the bathroom she went upstairs and sat on the couch. There was not enough air coming through at the couch and she then went outside because she felt dizzy and wanted fresh air, not that she thought it would be safer outside.

During her own testimony accused 1 also testified that accused 2 never asked the deceased for transport money during the altercation

about anal sex, but that the deceased had already given accused 2 transport money when he showed her where she would sleep much

earlier.

[111] Accused 1 further contradicted herself as to where she first saw the touch screen phone, alternating her testimony between in the taxi on the way to Pretoria and at Pretoria when it was sold.

[112] Accused 2 did not fare any better than accused 1. She contradicted herself in cross examination with regards to the sequence of events inside the deceased's flat, and in particular with regards as to when the deceased took out liquor and offered both accused a drink. She further contradicted her earlier testimony by testifying in cross examination that she and accused 1 each paid R250 for the trip from Pretoria to Billy the Bum. She also contradicted her earlier testimony by testifying in cross examination

that the money she had to withdraw at the ATM was not only for food, but also for accused 1 to have money.

[113] Accused 1's entire version with regards to the rumour she heard at the salon is so preposterous that it can be rejected out of hand. The incontrovertible evidence is that the video footage from the complex in which the deceased resided was only investigated in late 2020. This was more than a year after accused 1 claimed she heard the rumour of 'two girls from Pretoria'. The undisputed evidence of W/O Mojapelo was further that he only started connecting the dots in this case after he received the docket and discovered the link between the deceased and accused 1 from the latter's fingerprint lifted from a container in the deceased's kitchen. This could according to the undisturbed evidence in this case not have happened before at least December 2020, which was, according to accused 1's own version, more than a year after she heard the rumour at the salon. I have therefore no doubt that accused 1's version of the rumour she heard at the salon is false beyond any doubt. In my view that version

is indicative of a guilty mind.

[114] The versions proffered by the accused do not just suffer credibility and reliability due to the contradictions referred to earlier, but also due to other factors. From the photo album in exhibit C, the bed in the spare bedroom where it was alleged accused 2 went and slept, bear not evidence of anybody having used it. Photograph number 33, in particular, shows a bed that is neatly made with an unwrinkled bedspread. This clearly goes against the version of accused 2. The bags and boxes seen on the bed were never mentioned by any of the accused in their testimony. Exhibit C depicts a flat that looks ransacked. Strangely enough none of the accused had

anything to say about the state of the flat. The fact that they were not specifically asked about the state of the flat is neither here nor there. Human nature dictates that if they were shown pictures of a flat that looked different from the state in which they left it, they would, of their own accord, have said something about it, especially in a criminal trial where it could have given them an alibi defence. The objective evidence, therefore, clearly do not support the versions of the accused.

[115] In addition to what was said above, there are also some glaring improbabilities in the versions of the accused. I find it improbable that W/O Mojapelo would have found accused 2 without her abode being pointed out to him. I find it improbable that accused 2 would have tagged along with accused 1 and the deceased, just because a single, specific Uber driver did not answer his phone. It is further improbable that accused 1 would be left laying on a patch of grass in the deceased's security conscious complex with its guards, access control and cameras, in the light of day, without being disturbed by anyone. I further find it improbable that

the deceased would voluntarily hand his bank card and PIN to a stranger, with whom he had sex once, to hand to another stranger to go to an ATM and draw money. The fact that accused 2 was, despite having had the card and PIN, unsuccessful in her attempts to draw money rebels against the version proffered by the accused in this regard.

[116] I find the improbabilities in the versions of the accused so significant that it cannot be said that their versions are reasonably possibly true. That, together with all the other criticism levelled against their versions leaves me with the unassailable conclusion that their versions cannot be reasonably possibly true. I therefore reject it as false beyond a reasonable doubt.

[117] All the accepted evidence in this case, and the only reasonable inference that can be drawn from it, show that the two accused acted in common purpose, murdered the deceased, robbed him of his cellphone and house key with remote control, having inflicted grievous bodily harm on him, and attempted to steal money from his bank account. The law does not require that the sequence of the commission of these offences be determined. I therefore refrain from making any finding in this regard.

[118] In the indictment the State alleged that the murder was premeditate or planned. This allegation was placed in dispute by the defence. Having regard to the cause of death and the items used to bring about the death of the deceased, I am satisfied that the accused had ample time to consider what they were doing and to desist. Instead, they did the opposite and persisted with their actions, bringing about the death of the deceased. For a court to find that premeditation or planning was established does not require of the State to prove and elaborate scheme or the passing of a specific period of time. Taking into consideration the evidence in this case I am satisfied that the State proved the allegation made against the accused in the indictment beyond a reasonable doubt.[4]

[119] With regards to count 2, the State alleged that it fell under the provisions of s 51(2) of the CLAA. I expressed concern during the trial that the heading and wording of the charge did not refer to aggravating circumstances. At the end of the trial counsel for the State argued that robbery with aggravating circumstances was not a substantive offence, but merely a variant of the offence of robbery. Neither counsels for the defence took any issue herewith. After conducting my own research in this regard, I accept State counsel's submission on this aspect.

[120] Counsel for accused 2 took issue with count 2 on a different basis. She argued that because counsel for the State in her address on the merits stated that the items relating to this count were removed from the possession of the deceased after he was killed, the State could at best hope for a conviction on the competent verdict of theft. I am, however, not convinced by this argument of counsel for accused 2. It stands to reason that the address of counsel at the conclusion of the trial is not evidence. It is nothing more than counsel's opinion. It therefore has no probative value. Only evidence accepted by the Court carry any value.

The outcome of the trial can therefore never be dependant on counsel's submissions at the conclusion thereof, but rests entirely on the facts the Court found to have been proven or not. In this case the evidence proves without a shadow of doubt that the murder of the deceased was perpetrated with the intention of dispossessing him of his property. The violence perpetrated on him was therefore aimed at incapacitating him, preventing him from resisting this dispossession. With this the offence of robbery was committed in full. As to the existence of aggravating circumstances, logic dictates that killing a person is the most severe form of causing him grievous bodily harm. I am therefore satisfied that the State also proved this allegation beyond a reasonable doubt.

[121] For the reasons stated, I find that the State proved its case against both accused beyond a reasonable doubt and the accused are both found GUILTY AS CHARGED ON ALL 3 COUNTS.

W J BRITZ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearances:

For the State: Adv E Moseki – DPP Johannesburg

For Accused 1: Adv S Shongwe – Legal Aid Johannesburg (Judicare)

For Accused 2: Ms Y Britz – Legal Aid Johannesburg

[1] S v Shackell 2001 (2) SACR 194 (SCA)

[2] R v Blom 1939 AD 188

[3] S v Reddy and Others 1996 (2) SACR 1 (A)

[4] S v Peloeole 2022 (2) SACR 349 (SCA); S v Kekana [2014] ZASCA 158; S v Kekana 2019 (1) SACR 1 (SCA)

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